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# Supreme Court of the United States

OCTOBER TERM, 1971

## No. 71-192

JAMES JOHNSON,

Petitioner,

versus

OIL TRANSPORT COMPANY, INC.,
THE M/V FLYING A, AND BENDER
WELDING AND MACHINE COMPANY, INC.,

Respondents.

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Petitioner, James Johnson, prays that a writ of certiorari issue to the United States Court of Appeals for the Fifth Circuit, affirming a decree rendered by the United States District Court for the Southern District, of Alabama in Respondents favor.

## I.

## OPINIONS BELOW

A. This is a Petition to the United States Court of Appeals for the Fifth Circuit and specifically to its opinion dated March 12, 1971. This opinion is reported

at 440 F.2d 109 and is set out in full in Appendix A hereto.

B. The opinion of the District Court, dated July 15, 1969, is reported at _____ and is set out in full in Appendix B. hereto.

## II.

## JURISDICTION

A. The judgment of the Court of Appeals was made and entered on March 12, 1971, and is printed in Appendix C. Subsequently Petitioner filed in the Court of Appeals a petition for rehearing en banc, and alternatively, for a rehearing. By order dated June 24, 1971, the Court of Appeals denied said petition. A copy of said order is appended hereto as Appendix D.

B. On July 7, 1971, Petitioner filed an application with the Court of Appeals for a stay of the mandate within which to make application to this Honorable Court for a writ of certiorari, and on July 8, 1971, the Court of Appeals granted a stay of the mandate to August 7, 1971; the clerk of the Court of Appeals letter advising of the stay of mandate is printed in Appendix E. hereto.

C. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## III.

## QUESTIONS PRESENTED

Petitioner, a shorebased shipyard worker, was engaged in sandblasting the outside of the hull of a dry docked vessel to remove scale, old paint and rust in preparation for painting. He was injured when he fell from a defective scaffold erected on the floor of the dry dock and upon the outside of the vessel.

The questions for review on this Petition are:

1. When a shipyard worker is engaged in sandblasting the side of a ship to remove scale, old paint and rust in preparation for painting, shall such work be considered "traditional work of seamen" so as to require that the equipment he uses conform to the standards of the warranty of seaworthiness.

2. Where a vessel which is engaged in full commercial enterprize, enters dry dock for ten (10) days, and during such time maintains its full crew on shipping articles and on its payroll, and the vessel returns to full commercial enterprize after the ten (10) day period, with the same crew, and repair work is performed upon the vessel "under the direction of the owner's representative" ' "as directed by the owner's representative"; "under inspection by owner's representative"; "to the satisfaction of Master and owner's representative"; "to the satisfaction of Master of vessel"; is the vessel *in navigation* and owing the resulting obligation of seaworthiness.

3. Where pre-trial discovery procedures and affidavits disclose important and disputed questions of fact may a trial Court preclude trial by jury by granting motion for summary judgment.

## IV.

## STATEMENT OF THE CASE

Petitioner, James Johnson (Plaintiff below), was employed by Bender Welding & Machine Company, Inc., (Third-Party Defendant below), primarily as a sandblaster. He had worked for Bender approximately three months, but was an experienced sandblaster, having performed that work for six or seven years. On June 11, 1966, he was notified by Mr. R. T. Alonzo, supervisor of Bender's dry dock, to report to work on June 12, 1966, to perform work upon the M/V FLYING A, a vessel owned and operated by Oil Transport Company, Inc. (Defendant and Third-Party Plaintiff below).

At some time prior to June 8, 1966, Oil Transport and Bender entered into an agreement under which Bender was to perform general maintenance and servicing of the FLYING A at Bender's yard located in Mobile, Alabama. The vessel arrived in Mobile on June 8, 1966, and went into dry dock the following day. The work was commenced on June 9, 1966, and was completed on June 18, 1966. The maintenance, servicing, and repairs performed upon the vessel covered numerous items detailed in eighteen pages of invoice. The work entailed forty-two line items, thirty-five of which

were to be performed in the following manner: "under the direction or owner's representative"; "as directed by owner's representative"; "to the satisfaction of owner's representative"; "under inspection of owner's representative"; "to the satisfaction of Master and owner's representative"; "to the satisfaction of Chief Engineer and owner's representative"; "to the satisfaction of Master of vessel". The total cost of Bender's work was $29,160.00. During the ten days the FLYING A was in dry dock, it was provided with electrical power and fire protection from Bender.

The vessel entered the dry dock with a full crew; and, although the full crew was not aboard her during the repairs, the full crew complement was maintained on the ship's payroll which means they were on shipping articles during this time. Several members of the crew, however, did remain aboard the FLYING A and performed inspections and work on each of the ten days while she was dry-docked. The vessel's propeller was still intact when she was in dry dock and was in place at the time Petitioner received his injuries. The vessel entered Bender's yard with a full crew directly from commercial operations, and following the completion of the work, returned to her full commercial enterprises.

Petitioner was injured on June 12, 1966, when he fell from a scaffolding upon which he was standing while sandblasting the outside of the vessel's hull preparatory to its being painted. The scaffolding (composed of metal pipes or tubular steel sections), which had been rented from a local supply company by Bender,

had been erected by Bender employees on the floor of the dry dock and upon the outside of the vessel. Pieces of lumber were placed across the top of the scaffolding to provide a place upon which to stand — a platform. Normally, several boards are placed side-by-side and an equal number placed on top of those boards to provide extra support for the workers and their equipment. Petitioner's scaffold, however, only had two boards, approximately ten inches wide, beside each other. There were no other pieces of top for support, although Petitioner had requested such. These boards were not fastened together nor were they secured to the scaffold. There were no guard rails nor safety lines or ropes on the scaffold to protect the workers from falling, although, Petitioner had requested such.

Petitioner had ascended the scaffold and had been sandblasting the hull of the FLYING A about five minutes when he felt himself falling. He dropped the sandblasting hose which he had been holding with both hands, and he reached for something to grasp to catch himself. There was nothing for him to catch, either behind or forward, and he fell approximately twenty feet to the floor of the dry dock. The boards upon which Petitioner was standing were limber and buckled in the middle when he walked on them. These supporting boards placed on top of the ones upon which he was standing for support. Petitioner asserted that the boards collapsed or gave way under him.

Petitioner subsequently brought suit against Oil Transport and the M/V FLYING A. The complaint

sought recovery by Plaintiff for personal injuries sustained while performing work upon the M/V FLYING A, a vessel owned and operated by Oil Transport, alleging the vessel to be unseaworthy and negligence on the part of Defendant in failing to provide Plaintiff with a safe place within which to perform his work. Plaintiff's action was brought *in rem* against the vessel, M/V FLYING A, itself, and *in personam* against the vessel owners, Oil Transport.

Since the FLYING A had, prior to Plaintiff's injury, been delivered to Bender Welding & Machine Company, Inc., for general servicing and maintenance, Defendants filed a third-party complaint against Bender alleging indemnification if the Defendant was found liable to Plaintiff.

The Defendants challenged the complaint by motion for summary judgment, supported by affidavits, contending they were entitled to judgment as a matter of law and asserting that the FLYING A was not in navigation at the time of the accident and that Plaintiff was not performing work traditionally done by seamen, and thus was not entitled to the warranty of seaworthiness. Plaintiff submitted no counter-affidavits, but relied upon the deposition of Plaintiff, the depositions of two agents of his employer, Bender, and the documents and information elicited by Plaintiff's interrogatories and motions to produce.

The District Court granted Defendant's motion for summary judgment stating in its opinion that Plaintiff failed to show his entitlement to a seaworthy ves-

sel since the vessel was not in navigation because of surrender of the FLYING A by Oil Transport to Plaintiff's employer, Bender; and further stating that even if the vessel were in navigation, Plaintiff's work at the time was not the type of work traditionally performed by seamen since Plaintiff's work was of a specialized nature unknown to the traditional seamen. The Court further ruled that since Plaintiff was not aboard the vessel at the time of the accident, Plaintiff's assertion of Defendants' negligence in failing to provide a reasonably safe place within which to work also failed.

## V.

## REASONS FOR GRANTING THE WRIT

Initially, it should be noted that this case was decided by a sharply divided Court; that the majority opinion was concurred in its result but was specially concurred in on less than all its holdings and that Chief Judge Brown, a jurist widely known for his ability in the field of maritime law dissented strongly from the Courts opinion and from its decision denying Petitioner's application for rehearing.

The decision of the United States Court of Appeals for the Fifth Circuit herein conflicts with the holdings of this Court in *West v. United States*, 361 U.S. 118, 80 S. Ct. 189 (1959), and *Pope and Talbot v. Hawn*, 346 U.S. 406, 74 S. Ct. 202 (1953), and is in conflict with other Federal Courts of Appeal.

Petitioner James Johnson was removing old paint and rust from the hull of the M/V FLYING A in preparation for repainting. The equipment he used was a common sandblasting machine. The holding of the Court of Appeals is that, "... the gear and equipment required for sandblasting are not carried aboard vessels at sea, that sandblasting requires certain skill, training and experience and is the work of a specialist." and that this "... removes the work performed from the realm of seaman's work."

The Court of Appeals first states that its decision on the "in navigation" issue is dispositive of the case but then goes on to hold that the work of sandblasting paint is not work customarily performed by seamen, since, (1) such work requires the skills of a specialist and (2) the equipment used is not the type carried aboard vessels at sea. In holding, we urge, the Court is patently wrong and is in conflict with its own prior holdings and the holdings of other Courts of Appeal.

Martin J. Norris, in his leading work on maritime injuries interviewed many veteran masters, engineers and deck officers and, with their unanimous agreement states:

> "The deck sailors did the required painting work about the ship. This included painting the hull, superstructure, passageways, interior areas, living quarters, water tanks, etc., as well as chipping and scraping rust. Some of this work is still done by the crew, but most of it has been performed in recent years by

shoreside contractors." Norris, Maritime Personal Injuries 2*d* Ed., Sec. 51.

Chief Judge Brown, in his dissent in the present case has ably pointed out that the use of modern labor saving equipment does not change the obligations of the warranty of seaworthiness and his comments are reflected in the prior decisions of the Fifth Circuit and other Courts of Appeal with which the instant case is in conflict.

In *Huff v. Matson Navigation Co.*, 338 F.2d 205 (9 Cir. 1964) is found the following:

> "for the results of defects in unloading equipment brought on board ship by the stevedoring company should not be qualified or modified if the unloading equipment thus used happens to be newly devised and involves none of the traditional unloading gear of the ship. Use of more modern equipment can no more exculpate the shipowner from his obligations than could the use of 'more modern divisions of labor'. (Sieracki)".

The Third Circuit's holding in *Spann v. Lauritzen*, 344 F.2d 204 (3 Cir. 1965) involving a defective crane hopper is to the same effect.[1]

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[1]For similar cases involving equipment never destined to go aboard ships at sea; *Huff v. Matson Navigation*, 338 F.2d 205 (9 Cir. 1964); *Gebhard v. S.S. Hawaiian Legislator*, 425 F.2d 1303 (9 Cir. 1970).

The Second Circuit in *Skibinski v. Waterman Steamship Corp.*, 360 F.2d 539 (2 Cir. 1966) has held that a welding specialist, brought aboard to perform one isolated job of spot welding, was engaged in the traditional work of seamen and thus entitled to the warranty of seaworthiness. The opinion in the instant case does not even consider *Skibinski.*

The Court herein pays lip service to *Martin v. Jones*, 296 F. Supp. 878 (E.D. La. 1968) and conspicuously fails to overrule the same but completely ignores the fact that the shipyard worker there, albeit with a grinding wheel rather than a sandblaster, was engaged in precisely the same type work as James Johnson and the warranty was held to apply since the worker was engaged in the traditional work of seamen.

The holding further conflicts with the Fifth Circuits own holdings in *Deffes v. Federal Barge Lines, Inc.*, 361 F.2d 422 (5 Cir. 1966), cert. denied 385 U.S. 969 and *Chagois v. Lykes Bros. Steamship Co.*, 432 F.2d 388 (5 Cir. 1970). In *Deffes* it was contended that a marine leg was not traditional ship's gear. In *Chagois* the equipment involved was a screw auger which fed grain into a conveyor and ultimately into the ships hold. In both cases the Fifth Circuit Court of Appeals allowed recovery under the doctrine of unseaworthiness. It is submitted that the Courts decision in those cases conflicts sharply with its present opinion and has left the law in an utter state of confusion to the extent that the bar will no longer be able to advise claimants as to their rights short of litigating every case presented.

Further compounding the confusion which will without question flow from the instant decision is the emphasis the Court places on the location of the vessel. In an attempt to distinguish *Lawlor v. Socony Vacuum Oil Company*, 275 F.2d 599, (2 Cir. 1960), the Court states, "In that case, however, the vessel after having been in dry dock for three days was moored to a pier in navigable water when the injury occurred aboard the vessel." The same thought is expressed concerning *Martin v. Jones*, 296 F. Supp. 878 (E.D. La. 1968). Shortly after James Johnson was decided the Fifth Circuit rendered its decision in *Delome v. Union Barge Line*, ____ F.2d ____, (5th Cir. 1971), June 8 No. 31037. There the Court found that this type inquiry was not pertinent at all. "... as the cases illustrate, the warranty's existence and federal jurisdiction to consider alleged breaches depend upon conceptual considerations, such as status, ... The 'in navigable waters' spatial limitation is not determinative. It follows that any jurisdictional dichotomy between marine railways and other types of drydocks regarding the warranty of seaworthiness would be a fictional artifice, *contrived to ensure conformity to a spatial boundry which is not really pertinent.*" Emphasis added.

Further, the Court herein felt that, "It is also important to note that in the cases cited by appellant, the injury to the worker occurred aboard the vessel, not on the dry dock as in the present case." The Court has completely ignored this Court's holding to the contrary in *Gutierrez v. Waterman Steamship Corp.*, 373 U.S. 206, 835 Ct. 1185 (1963) and its own holdings in *Deffes v. Federal Barge Lines, Inc.*, 361 F.2d 422 (5

Cir. 1966) and *Bill Law v. Victory Carriers,* ____ F.2d ____ (5 Cir. 1970), and leaves us in bewilderment as to the state of the law.

The Court of Appeals makes no mention of *Pope and Talbot v. Hawn,* 346 U.S. 406, 74 S. Ct. 202 (1953), the leading case on the subject of injuries to ship repairmen, wherein this Court disclaimed the use of labels, to hold:

> "It is pointed out that Sieracki was a 'stevedore.' Hawn was not. And Hawn was not loading the vessel. On these grounds we are asked to deny Hawn the protection we held the law gave Sieracki. These slight differences in fact cannot fairly justify the distinction urged as between the two cases. Sieracki's legal protection was not based on the name 'stevedore' but on the type of work he did and its relationship to the ship and to the historic doctrine of seaworthiness. The ship on which Hawn was hurt was being loaded when the grain loading equipment developed a slight defect. ... His need for protection from unseaworthiness was neither more nor less than that of the stevedores then working with him on the ship or of seamen who had been or were about to go on a voyage. All were subject to the same danger. All were entitled to like treatment under law." 346 U.S. at 413.

It is submitted that the instant case is in direct conflict with the reasoning of *Hawn* and that "[E]xcept

for the traditional longshoremen loading or discharging cargo and repairmen making repairs or adjustments calling only for simple hand tools the warranty of seaworthiness means little in the Fifth Circuit. And what little it means today dwindles tomorrow with each new opinion." See opinion of Chief Judge Brown, dissenting from denial of petition for rehearing herein.

The Court of Appeals relied on *United N.Y. and N.J. Sandy Hook Pilots Ass'n v. Halecki*, 358 U.S. 613, 79 S. Ct. 517 (1959) in holding that Petitioner was not engaged in traditional work of seamen. Concerning *Halecki*, Norris has the following to say:

> "While the Courts have spoken of the traditional work of the crew, there is a singular lack of information or explanation other than a passing reference to painting as crew's work — with respect to which work is 'traditional' and which work is not. No workable standard of 'traditional work' has been given by the Supreme Court for the guidance of the lower courts. Ironically, we find, even that time-honored activity of all sailors, painting the deck, is no longer seaman's work when it is performed as part of other maintenance and repair activities.
>
> "It appears to me that *Halecki* flies so much in the face of *Sieracki* and of *Hawn*, that the possibility presents itself that the Supreme Court in *Halecki*, did not intend to set down a positive rule regarding the seaworthiness stat-

> us of the harbor worker but that *Halecki* may have been intended to be confined to its peculiar and particular facts." Norris, *Maritime Personal Injuries*, 2d Ed., Sec. 50 at page 112.

We strongly urge that the Court of Appeals decision herein further compounds the situation found by Norris and that a decision by this Court is required for the guidance of the lower Federal Courts and of those representing persons whose rights and liabilities are affected every day in the maritime industry.

The holding that the M/V FLYING A was not in navigation conflicts with this Courts holding in *West v. United States*, 361 U. S. 118, 80 S. Ct. 189 (1959) in that it "... magnifies *West* to the point where a ship is not a 'vessel'. This denies warranties of seaworthiness where the 'operational withdrawal' is for but a brief period of time."* The Courts decision in the instant case is so contrary to this Courts opinion in *West*, to the opinion of the Second Circuit in *Lawlor v. Socony-Vacuum Oil Co.*, 275 F.2d 599 (2 Cir. 1960) and to the Fifth Circuit's own opinion in *Union Barge Line Corp. v. Allen*, 361 F.2d 217 (5 Cir. 1966) as to be in direct conflict therewith.

In *West*, this Court was confronted with a vessel which had been in moth-balls for years and which was undergoing work the equivalent of "home port structural repairs". No one would deny that this Court was correct in deciding that under such circumstances the

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*See dissent of Chief Judge Brown herein.

vessel was not "in navigation" and indeed had not been for years. The instant case presents diametrically opposed facts. Here the FLYING A was engaged in regular commerce the day before being dry docked. The crew remained on shipping articles during the ten (10) day repair period with some members remaining on board to direct repairs. The work to be done was in no way concerned with structural repair as in *West* and at best involved only routine maintenance. Upon completion of the work the FLYING A immediately returned to full and regular commercial endeavor. This Court carefully pointed out in *West* that an important issue there was that the owner had ". . . no power either to supervise or to control the repair work on which petitioner was engaged." The Court of Appeals in the present case decided the case on the basis of affidavits, where the affiants were not subject to cross examination. The Court apparently gave no weight whatsoever to the repair contract, in evidence, which says "above painting and sandblasting to be *under the direction of the vendor's representative and owner's representative.*" Emphasis added. The very work petitioner was engaged in was clearly subject to the owners control, or at least a jury should be allowed to decide. Not only was the painting and sandblasting under the direct control of the owner but, according to the contract, 5/6 of *all* the work was subject to provisos similar to that quoted above.

The facts, therefore are exactly the opposite from those in *West*. Yet the Fifth Circuit found that the vessel was not "in navigation". Such a result is tenable only if the facts in *West* are completely disregarded.

In *Lawlor v. Socony-Vaccum Oil Company*, 275 F.2d 599 (2 Cir. 1960) the Second Circuit was presented with facts very similar to those in the present case. There, water and power was supplied from shore, no structural changes were made, the vessel's hull was painted and cracks in the tanks were repaired along with a large number of other miscellaneous items. The repair bill was over $70,000.00, more than twice the cost of the repairs in the instant case. The facts also differ in that the crew in *Lawlor* remained aboard during the repairs while in the case of the FLYING A most of the crew slept ashore, even though they remained on "articles". Further, in *Lawlor* the repair period lasted 14 days while in the present case the period was for only nine days. Also, in *Lawlor* the work of the Plaintiff was conceded by the Court to be under the control of the independent contractor while in the present case according to the contract, the sandblasting itself was performed "under the direction of the owners representative." Counsel would have to look far to find precedent more nearly in point than *Lawlor*, however the present case refuses to follow the lead of the Second Circuit and distinguishes its holding from that by the off hand statement that the vessel in *Lawlor* had been taken from dry dock and was moored to a pier when the injury occurred. A less satisfactory explanation can hardly be imagined especially when the same Court a few weeks later goes to eloquent lengths to demonstrate that this fact is not pertinent. *Delome v. Union Barge Line Company*, ____ F.2d ____, (5 Cir. 1971). June 8, 1971, No. 31037. We are thus left with divergent views between the two circuits and even within the Fifth Circuit itself.

If *Lawlor* is sound precedent upon which to advise James Johnson then the Fifth Circuits own prior case of *Union Barge Line v. Allen*, 361 F.2d 217 (5 Cir. 1966), affirming 239 F. Supp. 1004 (E.D. La. 1965) would delight the most timorous advocate and impel him to prepare suit at once. In *Allen* the time of repair was similar and the worker fell from a scaffold just as James Johnson did. In fact the only difference the majority found in the two cases was that in *Allen* the galley crew and the engine room crew remained aboard during the repair period. The distinction apparently sought is that somehow these two crews retained "control" of the vessel for the owner. While, no doubt shipowners will be satisfied with the Courts holding on the law they must surely turn their heads in polite amusement at the suggestion that the chief cook is the "master" and in "control" of their vessel. Certainly this is no rational distinction between the two cases and the Courts decision in *James Johnson* makes a definitive opinion by this Court imperative.

In concluding that the FLYING A was not "in navigation" the Court of Appeals apparently also relied on its view that the repairs were of such a nature as to be considered "major" changes in the vessel. Indeed, in his dissent, Chief Judge Brown was left with the impression that the vessel was being "wholly rebuilt". His comment on this finding is as follows:

> "From a reading of this Court's opinion one would think that the vessel was being wholly rebuilt. Cf. *Watz v. Zapata Off-Shore Company*, 5 Cir. 1970, 431 F.2d 100, 1970 A.M.C. 2307.

Just how judges — 'Solomonic or life tenured' — can reach this conclusion as a *matter of law*, I do not know. If we know anything we know that in this inflated world in which a slight traffic tap precipitates an automobile repair bill running into the hundreds of dollars for bumper and fender damage, $30,000 will not buy much in the way of steel and skilled labor.

"But we need not search out the limits of our prescience for this record shows not extensive re-outfitting, but routine, periodic maintenance repairs. Out of the 42 items on the ship repair invoice, 34 were for items not in excess of $500. Indeed, of the 34, over 16 were for less than $200 each. They covered such routine items as removal of a wasted sun visor over the pilot house window, building up a docking plug in a cargo tank, mucking out (cleaning) the anchor chain locker of mud and debris, a micrometer reading of the two tail shafts, renewal of a six-foot length of a one-inch pipe guardrail, replacing five deck vent ports, repairing five treads in two ladders (stairs), installing five steam hose hangars, and the like. The most extensive items were sandblasting and repainting the hull ($10,000) and the necessary lay days ($1,100). None of the other items was of a radical, unusual, or extensive nature. These include renewal of a 10-inch deck cargo header line on the main deck ($2,625), repairs to the starboard generator ($1,562), and pulling and reinstalling tail shafts and propellers

($2,952). Although these were important repairs which a prudent shipowner would undertake, there is not a stitch of evidence in the affidavits or depositions to indicate that they were anything but routine periodic survey and maintenance repairs.

"But considering the size of the vessel — 260 feet in length — and her obvious value, neither the dollar amount of these repairs nor their nature indicated anything so drastic as to characterize the vessel as 'withdrawn' from navigation."

Petitioner feels compelled to emphasize the observation of Judge Brown that the affidavits of the Respondent do not characterize the work done on the FLYING A as "*major*". This fact is especially revealing when it is remembered that these affiants were not subject to cross examination. Surely, Counsel for Respondent was aware of the significance of such a distinction and if the repairs could, in good conscience, be considered major, a statement to that effect would have been made.

Rule 56, Federal Rules of Civil Procedure (28 U.S.C.A.), states in substance that if there is no genuine issue of any material fact before the court that the moving party as a matter of law is entitled to judgment, the summary judgment sought is to be rendered. However, it has been held that summary judgments should be granted only in cases where it *conclusively* appears from the record that there is no genuine issue

as to a material fact, and that the motion may not serve as a substitute for trial by jury or as a means to try by affidavits disputed issues of fact. Fed. R. Civ. P., 56 (c); *Booth v. Barber Transp. Co.*, 256 F.2d 27 (8th Cir. 1958).

In the instant case, the District Court overlooked and failed to perceive a conflict in facts which it considered material to the case. The Court's opinion stated that "the vessel had no propeller". Complete disregard was had for Petitioner's statement in his deposition that the propeller was intact at the time of the accident. Respondent's affidavits assert that the propeller was removed and sent out of Mobile for reconditioning, but neither the affidavits nor the invoice of Bender show when this took place. Petitioner unequivocally stated the propeller was on the FLYING A when he began his work. Based upon the apparent weight which the District Court merited to this fact, concluding essentially that the FLYING A was a "dead ship", this conflict of evidence upon a factor which the Court found material, was sufficient by itself to preclude the granting of Defendants' motion for summary judgment. Fed. R. Civ. P., 56 (c); *Braniff v. Jackson Ave.-Gretna Ferry, Inc.*, 280 F.2d 523 (5th Cir. 1960), rehearing denied 289 F.2d 939.

The Court of Appeals decided that there was no dispute as to any material fact and then inquired "... into the question of control over the repair operations and the nature and extent of those operations in order to determine if the FLYING A was in navigation at the time of the accident." The Court went on to find as fact, Respondent's contention that the vessel's Chief

Engineer was the only crew member who went aboard during the repair period. Evidence proffered by Plaintiff-Petitioner that some of the crew were aboard was dismissed by the Court with the statement that this "... was not of significance in view of the aforementioned affidavits ...".

These same affidavits were accepted as statements of undisputed fact also for the proposition that Bender personnel directed the entire repair operation. No mention at all was made of Petitioners contrary position which was supported by the repair contract itself which was before both the District Court and the Court of Appeals, and which expressly provided that 5/6 of all the repairs were to be supervised in some degree by the vessel's owners; the sandblasting itself to be "under the direction of the owners representative". The Court makes no mention of the fact that the vessel's Port Captain also remained aboard the ship during the repair period. Both Courts completely disregarded the fact that the entire crew remained on shipping articles during the entire stay at the drydocks.

It is further submitted that the issues of negligence and of contributory negligence which clearly were present on the evidence before the District Court were likewise sufficient to preclude the summary judgment. *Bodden v. Co-ordinated Caribbean Transport, Inc.*, 369 F.2d 273 (5th Cir. 1966); *Van Horn v. Gulf Atlantic Towing Corp.*, 388 F.2d 636 (4th Cir. 1968); *Braniff v. Jackson Ave.-Gretna Ferry Inc., supra.* Even though the respected District Court may have entertained the belief that Petitioner would not prevail on the issues, such belief is not ground for granting summary judg-

ment. *United Pacific Ins. Co. v. United States*, 296 F.2d 160 (8th Cir. 1961). As the Court in *Rogers v. Peabody Coal Co.*, 342 F.2d 749 (6th Cir. 1965) concluded:

> "[E]ven where the trial judge reasonably may surmise that Plaintiff is unlikely to prevail upon a trial, that is not a sufficient basis for refusing him his day in Court, with respect to issues which are not shown to be sham, frivolous, or so unsubstantial that it would obviously be futile to try them." *ID.* at 751.

Here, the complex issues of fact and of law, and the mixed questions of law and fact rendered this case not susceptible to disposition by summary judgment. Further, the issue of whether or not the vessel, upon which Petitioner was working, was "in navigation" at the time of the injury to him made out a factual jury question and should not have been summarily disposed of by summary judgment. *Bodden v. Co-ordinated Transport Inc., supra; American Export Lines v. Norfolk Shipbuilding & Drydock Corp.*, 336 F.2d 525 (4th Cir. 1964).

The findings of the Court were thus erroneous in view of the conflict in evidence before it at the time Defendants' motion for summary judgment was heard and in view of the genuine issues which were present in the matters before the Court.

## CONCLUSION

The decision of the District Court and the Court of Appeals involves important questions of Federal Maritime Law which affects the entire maritime industry in its day to day operations. The Court of Appeals decision herein has left the state of the law in confusion and provides no standards by which to advise members of that industry.

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be granted and that the decree of the Court of Appeals should be reversed.

Respectfully submitted,

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**PROOF OF SERVICE**

I, Ross Diamond, Jr., one of the attorneys for Petitioner herein and a member of the Bar of the Supreme Court of the United States hereby certify that on the ____ day of August, 1971, I served three copies of the foregoing brief of Petitioner on Oil Transport Company Inc., and Bender Welding and Machine Company Inc., by mailing to same in duly addressed envelopes with first class postage prepaid to Hon. Brunswick Deutsch, 1700 Hibernia Bank Building, New Orleans, Louisiana 70112 and to Hon. A. Clay Rankin, 30th Floor First National Bank Building, Mobile, Alabama 36601, Attorneys for Respondents.

ROSS DIAMOND, JR.

## APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 28418

JAMES JOHNSON,
Plaintiff-Appellant,
versus

OIL TRANSPORT COMPANY, INC., a corporation,
Defendant and Third-Party
Plaintiff-Appellee,
versus

BENDER WELDING & MACHINE COMPANY, INC.,
Third-Party Defendant.

Appeal from the United States District Court for the Southern District of Alabama

(March 12, 1971)

Before BROWN, Chief Judge, AINSWORTH and GODBOLD, Circuit Judges.

AINSWORTH, Circuit Judge: This is a suit in admiralty by a shore-based shipyard worker for damages for personal injuries against a shipowner, growing out

of the servicing and repairing of a vessel in dry dock. James Johnson, an experienced shipyard sandblaster, was injured in a fall to the floor of a dry dock from a scaffolding on which he was standing while sandblasting the outside hull of the M/V FLYING A, which was out of the water, preparatory to the vessel's being painted. The scaffolding, which was made up of various connecting metal sections, had been rented by appellant's employer, Bender Welding & Machine Company, Inc., and erected on the floor of its dry dock by Bender employees. The scaffolding extended up and around the vessel but was not attached to it and at no time had appellant been on board the vessel. The platform, from which appellant fell, consisted of two 2x10-inch boards placed side by side upon the scaffolding. According to appellant, the unsupported boards "gave way" when he walked on them. A few minutes later he fell. He did not know what actually caused his fall, whether the boards broke or again "gave way." There was nothing he could grasp when he felt himself falling.

Johnson sued the vessel and its owner, Oil Transport, Inc., alleging negligence and unseaworthiness. The shipowner thereafter filed a third-party complaint against Bender Welding & Machine Company, Inc. for indemnity. Based on the pleadings, various affidavits, depositions and exhibits on file, the District Court then granted the shipowner's motion for summary judgment on the grounds that the allegation of negligence was not supported by the undisputed facts, and that plaintiff was not entitled to the warranty of seaworthiness because (1) the vessel was not in navigation at the time of the accident complained of and (2) plain-

tiff was not performing the type of work traditionally performed by seamen.

For reasons which follow, we affirm the District Court. We agree that the facts do not support a finding of shipowner negligence, that no warranty of seaworthiness was owing to appellant as the vessel was not in navigation, and further that appellant was not performing seaman's work when injured.

*THE NEGLIGENCE ISSUE*

Appellant's charge of negligence is predicated on the alleged failure of appellee to provide him with a safe place to work.[1] There is no contention, however, that the vessel itself was unsafe. The place upon which appellant was working — the scaffolding and dry dock upon which it rested — was not provided by the shipowner but by appellant's employer Bender. The District Court found from the undisputed facts that "appellant never went aboard the vessel, ... he never touched the vessel. His work was to be performed completely on the outside of the vessel with equipment

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[1] "Of course, one aspect of the shipowner's duty to refrain from negligent conduct is embodied in his duty to exercise reasonable care to furnish a safe place to work." West v. United States, 361 U. S. at 123, 80 S. Ct. at 193; Stark v. United States, 5 Cir., 1969, 413 F. 2d 253; Moon v. United States, E. D. N. Y., 1960, 197 F. Supp. 406; Drlik v. Imperial Oil Limited, N. D. Ohio, 1955, 141 F. Supp. 388. *West,* however, rejected the contention that such a duty was owed under the circumstances of that case, stating: "Petitioner overlooks that here the respondent had no control over the vessels, or power either to supervise or to control the repair work in which petitioner was engaged. We believe this to be decisive against both aspects of plaintiff's dual theory." 361 U. S. at 123, 80 S. Ct. at 193.

which was owned and managed by his employer and which was shorebased. The plaintiff worked completely under the direction and supervision of Bender's personnel. None of the equipment or scaffolding was supplied, operated or owned by the defendant." The additional finding by the Court, that the vessel and the overhaul operation were in the complete care and custody of the shipyard, is satisfactorily established by the record.[2] The District Court, therefore, correctly dismissed the negligence claim.

*THE WARRANTY OF SEAWORTHINESS*

In order to prevail under the unseaworthiness aspect of this case, appellant as a dry dock-based non-seaman must show that he fits somewhere between the broad confines of *Seas Shipping Co. v. Sieracki*, 328 U. S. 85, 66 S. Ct. 872 (1946), on one end of the spectrum, and the outside limitations of *West v. United States*, 361 U. S. 118, 80 S. Ct. 189 (1959), on the other. Essential to the existence of the warranty of seaworthi-

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[2]Apart from appellant's untenable theory of negligence based on an alleged unsafe place to work, we know of no basis for a negligence claim other than the Extension of Admiralty Jurisdiction Act, which is not applicable here. The Act declares in pertinent part: "The admiralty and maritime jurisdiction of the United States shall extend to and include all cases of damage or injury, to person or property, caused by a vessel on navigable water, notwithstanding that such damage or injury be done or consummated on land." 46 U.S.C. § 740. It would obviously be illogical to theorize that the vessel itself could have caused the defect in the scaffolding, *cf.* Thompson v. Calmar Steamship Corporation, 3 Cir., 1964, 331 F. 2d 657, or that the impact of a shipowner's tort emanating on board the vessel was felt ashore, *cf.* Gutierrez v. Waterman Steamship Corp., 373 U. S. 206, 83 S. Ct. 1185 (1963).

ness is the in-navigation status of the vessel. The principle is self-evident. If the vessel is not in navigation there is no warranty of seaworthiness. *Roper v. United States*, 368 U. S. 20, 82 S. Ct. 5 (1961).[3] Noted to this statement in the margin in *Roper* is the following language:

> "The view that a vessel not in navigation extends no warranty has often been expressed in the more familiar context of to whom does the warranty extend. E. g., Union Carbide

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[3] *See also* Desper v. Starved Rock Ferry Co., 342 U. S. 187, 72 S. Ct. 216 (1952), in which the issue presented was whether a decedent was a seaman at the time of his accidental death. The facts indicated that "the boats were not afloat and had neither captain nor crew. They were undergoing seasonal repairs, the work being of the kind that, in the case of larger vessels, would customarily be done by exclusively shore-based personnel." The Court concluded that while decedent had been engaged in such repair work he was not a seaman and that the "distinct nature of the work is emphasized by the fact that there was no vessel engaged in navigation at the time of the decedent's death." 342 at 190, 191, 72 S. Ct. at 218.
In Stark v. United States, 5 Cir., 1969, 413 F. 2d 253, 254, we refused to extend the warranty of seaworthiness to employees of a ship repair company who were injured while working inside tanks of a vessel which was undergoing a complete overhaul and reactivation and was neither in possession nor control of the shipowner. It was "dead ship, incapable of navigation and unable to serve any of the purposes of a vessel in navigation." We agreed with the District Court's application and interpretation of *West* "as authority for the proposition that there is no warranty of seaworthiness where the vessel had been withdrawn from navigation and placed in the custody and control of another." However, we remanded on the issue of negligence. In so doing we noted that, unlike the facts in *West* in which the repair work created the unsafe condition, there was unanswered the question of whether the shipowner had in fact turned over a ship that was a reasonably safe place in which to work. We are not confronted with that problem here.

> Corp. v. Goett, 4 Cir., 1958, 256 F. 2d 449. Implicit within such cases is the reasoning that those working on vessels not in navigation are not seamen (or doing seamen's work) and consequently not among those employees protected by the warranty of seaworthiness."

368 U. S. at 24, 82 S. Ct. at 7, 8. Consequently, if the vessel here was not in navigation it follows that the work appellant was performing at the time of the accident was not seamen's work, and that the District Court properly held no warranty of seaworthiness was owed.

The question of whether the warranty of seaworthiness should attach to a vessel which had been turned over by its owner to a contractor and dry docked for repairs or reactivation was considered extensively by the Supreme Court in *West v. United States*, 361 U. S. 118, 80 S. Ct. 189 (1959). There a United States vessel, the MARY AUSTIN, which had been "deactivated" for "several years" was turned over from the "moth ball fleet" to an independent contractor for reactivation and a complete overhaul. An employee of the contractor was injured while working inside a low pressure cylinder when a loose-fitted plug hit his knee. Under the agreement the "contractor was to have complete responsibility and control of the making of the repairs, with the right in the United States to inspect the work and materials to insure compliance with the contract. For this purpose, the United States placed six of its men — a captain, chief mate, second mate, chief engineer, assistant engineer, and steward — on board the vessel. However, they signed no shipping articles and had no 'control of the ship in the

ordinarily accepted context,' their sole function being to serve as inspectors for the United States." 361 U.S. at 119, 120, 80 S. Ct. at 191. Under these circumstances, the Supreme Court affirmed a judgment denying recovery against the shipowner on claims of negligence and unseaworthiness, holding *inter alia*, that "[t]he Mary Austin, as anyone could see, was not in maritime service." 361 U. S. at 122, 80 S. Ct. at 192. The Court made numerous important observations, useful as governing principles, in finding that no duty was owed to the injured worker. For instance, it reiterated the *Sieracki* principle that the warranty applies when a shoreworker "is, in short, a seaman * * * doing a seaman's work and incurring a seaman's hazards." 361 U. S. at 120, 80 S. Ct. at 192. It distinguished the case from those in which the vessels "were, at the times of the injuries, in the hands and under the control of the owners or charterers, and, instead of undergoing general repairs, were in active maritime service in the course of loading or unloading cargo pursuant to voyages." 361 U. S. at 121, 80 S. Ct. at 192. It indicated that the warranty requires something more than the circumstances of the employee merely being "on board ship and performing work traditionally done by seamen," 361 U. S. at 120, 80 S. Ct. at 191, and that the warranty does not attach when the vessel is "not in maritime service . . . undergoing major repairs and complete renovation" with petitioner taking "his orders from the contractor, not the shipowner . . ." in an "undertaking" which "was not 'ship's work' but a complete overhaul of such nature, magnitude, and importance as to require the vessel to be turned over to a ship repair contractor and docked at its pier for

the sole purpose of making her seaworthy." 361 U.S. at 122, 80 S. Ct. at 192.

The Court, in *West*, further said:

> "It would appear that the focus should be upon the status of the ship, the pattern of the repairs, and the extensive nature of the work contracted to be done, rather than the specific type of work that each of the numerous shore-based workmen is doing on shipboard at the moment of injury."

361 U.S. at 122, 80 S. Ct. 192.

The following year, in *Roper v. United States*, *supra*, the Supreme Court cited its decision in *West* with approval and said:

> "The test for determining whether a vessel is in navigation is the 'status of the ship,' West v. United States . . ."

368 U. S. at 22, 82 S. Ct. at 6. The vessel in *Roper*, a deactivated Liberty ship, had been relegated to the "moth ball fleet" and later used solely as a granary. A longshoreman was injured while assisting in an unloading operation of grain from the vessel after it had been towed to a grain elevator for that purpose. The issue presented was whether events subsequent to the ship having been withdrawn from navigation altered this status. The Court held that the ship had not been converted to any navigational use; further, that the vessel had been moved under the control of the tug

captain, and that there was no warranty of seaworthiness in favor of the injured longshoreman since the vessel was not in navigation.

Governed, therefore, by the guidelines in *West*, as substantiated by *Roper*, we inquire into the question of control over the repair operations and the nature and extent of those operations in order to determine if the FLYING A was in navigation at the time of the accident.

Prior to the injury complained of, Oil Transport, Inc. and Bender Welding & Machine Company, Inc. entered into an agreement under which Bender contracted to perform a general overhaul involving certain repairs, maintenance and other services to the FLYING A at Bender's shipyard in Mobile, Alabama. The work covered numerous items which are detailed in an eighteen-page invoice. On June 8, 1966, the vessel was placed in dry dock. Work was begun on the following day and completed nine days thereafter on June 18, at a total cost of $29,160. The accident occurred in the interim, on June 12. During the time the vessel was in dry dock, electrical power and water for fire protection were shorebased and furnished by Bender. No meals were prepared and no watches kept on board. Upon completion of the work she returned to her regular loading operations. One propeller of the twin-screw vessel had been removed at the time of the accident. It was established by affidavit of Bender's Vice President that no officer or crewman either went aboard the vessel or was present at the shipyard with the exception of the Chief Engineer, who was quartered ashore in the City of Mobile and who visited the yard periodically

to inspect the work. The function of the Engineer was to order or authorize various items of repairs and to approve the work upon completion. The repairs were made under the supervision of Bender personnel and included the following:

> Sandblasting and painting the entire hull and superstructure, dismantling of the generator heads and pistons, opening the main generator bearing for inspection, removing and installing new generator valves, replacing cargo header lines with larger ones, removing the starboard propeller from the vessel and sending it to a shoreside independent contractor for repair and balancing, removing the starboard tail shaft and propeller shaft for repair, removing the starboard stern tube bushing for repair, and numerous other incidental items.

Absence of a crew aboard the FLYING A and a total lack of any participation by the crew in the repair activities performed by Bender were corroborated by affidavit of the President of Oil Transport Company, Inc., as was the statement that the Chief Engineer was the only individual connected with the FLYING A who went aboard the vessel but who remained in Mobile and was not aboard the vessel during the period of repairs. Appellant submitted no counter affidavits, relying instead upon depositions and exhibits already of record. The only evidence which appellant contends is disputed is that relative to the question of whether any member of the FLYING A remained aboard the vessel and the related question of control and supervision of the repairs. But an examination of the record

shows no dispute of any material fact in this regard. To the contrary, much of the evidence pointed out by appellant substantiates the findings of the District Court. Appellant himself admitted in his deposition that to his knowledge only one person was aboard at the time of the accident. He referred to this person as the "mate" or "captain" who offered to render medical assistance while awaiting an ambulance after the accident. But he further admitted that he did not know any of the officers or employees of Oil Transport, had never been employed by that company and had never seen the FLYING A prior to that occasion. Appellant's salary was paid by Bender and he took orders from Bender men. A single statement by deposition of a Bender employee that some of the crew were aboard, but because of the fact that the men "come and go, and this, that and the other," he could not tell whether they represented a full crew or not, was not of significance in view of the aforementioned affidavits and appellant's admitted statements to the contrary. The correctness of the Court's findings that the repairs were performed under the exclusive control and supervision of Bender's personnel, and that the vessel had been totally surrendered to the care and custody of the shipyard, was also substantiated by the daily log sheets of the FLYING A for the time during which the repairs were being made. One entry, made each day including the day of the accident, reads "Routine inspections made." Such activity is not indicative of control by the shipowner when compared to *West* whose shipowner had "placed six of its men — a captain, chief mate, second mate, chief engineer, assistant engineer, and steward — on board the vessel" for the purpose of inspecting "the work and materials to insure compli-

ance with the contract." 361 U. S. at 119, 80 S. Ct. at 191.

In the cases cited by appellant concerned with accidental injuries sustained by workers on vessels in dry dock, it affirmatively appears that a crew of the vessel remained on board during the repairs and that complete control of the vessel had not been relinquished to the ship repair contractor. For example, in *Bodden v. Coordinated Caribbean Transport, Inc.*, 5 Cir., 1966, 369 F. 2d 273, the vessel had been in dry dock for approximately twenty-four days at the time of the vessel-based injury sued on, and repairs to the vessel lacked only three days of completion. Control by the master of the vessel over the injured worker, the presence of fifteen crew members aboard, and the fact that the worker had signed shipping articles, were considered relevant factors in reversing a summary dismissal of the complaint denying seaman's status to the worker and in-navigation status to the vessel. In *Union Barge Line Corporation v. Allen*, 5 Cir., 1966, 361 F. 2d 217, we adopted the District Court's opinion which held, *inter alia*, that a vessel, dry-docked for seven days, was in navigation where the facts showed that the engine room and galley crews remained aboard, the work being performed by the injured shipyard employee (removing or replacing a coupling from a shaft aboard the vessel) was work usually performed by seamen and the work being performed by the ship repair company was usual, routine maintenance work. In *Lawlor v. Socony Vacuum Oil Company*, 2 Cir., 1960, 275 F. 2d 599, the vessel was undergoing no major repairs and the shipowner retained "general control" of the vessel even though control of the pertinent area

was by the shipyard. A crew of officers and men were aboard and the work being performed was of the type customarily done by seamen. In that case, however, the vessel after having been in dry dock for three days was moored to a pier in navigable water when the injury occurred aboard the vessel.[4]

It is also important to note that in the cases cited by appellant, the injury to the worker occurred aboard the vessel, not on the dry dock as in the present case.[5]

Obviously no precise common test for determining when a vessel is in navigation underlies the various decisions on the subject. To paraphrase language of the Second Circuit in *Hawn v. American S. S. Co.*, 2 Cir., 1939, 107 F. 2d 999, 1000, in discussing the meaning of the term "member of a crew." "It is impossible to define the phrase ['in navigation'], in general terms; the words are colloquial and their fringe will

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[4]In Martin v. Jones, E. D. La., 1968, 296 F. Supp. 878, a District Court case cited by appellant, in which an employee of a ship repair company was injured, the opinion does not state whether the vessel's crew remained aboard for the three-day period during which minor repairs were made. The repairs were performed at a shipyard but apparently not in a dry dock.

[5]See Bodden v. Coordinated Caribbean Transport, Inc., 5 Cir., 1966, 369 F. 2d 273; Union Barge Line Corporation v. Allen, 5 Cir., 1966, 361 F. 2d 217; Lawlor v. Socony Vacuum Oil Company, 2 Cir., 1960, 275 F. 2d 599. In Drlik v. Imperial Oil Limited N. D. Ohio, 1955, 141 F. Supp. 388, also cited by appellant, the injury occurred upon a dock to a worker handling the shore end of a cable. However, as in *Lawlor*, the vessel had been removed to navigable water and was being undocked at the time. Not only was the shipowner in control, but the crew and officers were aboard the vessel and the offending act was that of a crew member negligently operating the winch engine to which the cable was attached.

always be somewhat ragged. Perhaps the best hope is that, as the successive variants appear, they will finally serve rudely to fix the borders." The problem is somewhat the same here. Nevertheless, the combination of the variants in the instant case compared with those in the cited cases, including the criteria in *West*, requires the conclusion that the FLYING A was not in navigation when the accident occurred.

In our recent decision in *Moye v. Sioux City & New Orleans Barge Lines, Inc.*, 5 Cir., 1968, 402 F. 2d 238 (Dyer, J.), we affirmed a lower court judgment which dismissed the claim of a shore-based repair worker for injuries suffered aboard a barge which was drydocked in the yard of a ship repairer. We rejected the claim predicated on negligence and unseaworthiness of the barge, and held:

> "This work required the barge to be drydocked by Saucer [the ship repairer] who, from the time it received the barge until the work was completed, had exclusive control of the barge and the lighting under which the repairs were effected. The barge was designed to carry no motive power, lights or crew. Sioux City [the barge owner] had no representative or crew aboard at any time while the barge was in Saucer's yard. Under these circumstances we hold that there was no warranty of seaworthiness by the ship owner running in favor of shore-based workers on the vessel."

402 F. 2d at 240. Chief Judge Brown, in a concurring opinion in *Moye*, pointed out — and we agree with his

observation — that "physical possession and control of it [the barge] does not extinguish the warranty of seaworthiness as to one in the ambiguous-amphibious seaman's status. . . . It is a mistake, but not one made by this Court in this opinion, to read *West* as a holding that once all of the owner-charterers' employees have left the scene the warranties of seaworthiness or Jones Act statutory obligation of furnishing a safe place to work will evaporate." 402 F. 2d at 241.

So it is possible, therefore, that an injured ship repair employee may have a valid claim against a shipowner for damages due to unseaworthiness of the vessel where control of the vessel has been relinquished by the owner. But each case depends on its own facts and circumstances, and the instant case is not such a case.[6]

In the present case there was much more than mere relinquishment of possession and control of the vessel. No part of the ship or its machinery was in anywise defective, the vessel did not cause equipment to become defective, and the injury was not sustained aboard the vessel. The worker, who never went aboard the ship at any time, fell from a scaffold which was rented and erected by the ship repairer. The scaffold did not touch the vessel, and the work was under the

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[6] **Appellant's contention that possession and control of the vessel are immaterial here because in rem liability has been asserted against the vessels, is untenable. As appellee points out [and we have found nothing in the record to the contrary], in rem jurisdiction was not perfected in this case by appellant. There, of course, can be no in rem liability without compliance with the requisites for in rem jurisdiction. See Federal Rules of Civil Procedure, Supplemental Admiralty Rule C.**

exclusive charge of the ship repairer. The injury occurred off the vessel when Johnson fell from the scaffolding to the floor of the dry dock. These peculiar facts compel a holding that there was no unseaworthiness of the vessel. *See also Parker v. Cargill, Inc.*, 5 Cir., 1969, 417 F. 2d 772, in which we affirmed the District Court's rejection of the claim made of a ship repair employee for injuries sustained aboard a barge which was under the exclusive control and custody of the repairer during the operations, and in which the injury was caused either by molasses residue on the barge or a portable lantern left hanging on a ladder. *Cf. Patterson v. Humble Oil, Etc.*, 5 Cir., 1970, ____ F.2d ____ [No. 26365, February 27, 1970], (*cert. denied*, ____ U.S. ____, ____ S. Ct. ____ (1971) ), where the claim of a ship repair employee was denied on allegations of negligence and unseaworthiness, the injury having been caused by the defect the employee had come on board to repair, the Court citing *West v. United States*, 361 U. S. 118, 123, 80 S. Ct. 189, 193 (1959), as follows:

> "It appears manifestly unfair to apply the requirement of a safe place to work to the shipowner when he has no control over the ship or the repairs, and the work of repair in effect creates the danger which makes the place unsafe."

As recognized by the District Court, the conclusion that the FLYING A was not in navigation in itself is sufficient to defeat recovery under the allegation of unseaworthiness. *Roper v. United States*, 368 U. S. 20, 23-24, 82 S. Ct. 5, 7 (1961). *See also West v. United States, supra; Stark v. United States*, 5 Cir., 1969, 413

F. 2d 253; *Alfred v. MV Margaret Lykes,* 5 Cir., 1968, 398 F. 2d 684; *Van Horn v. Gulf Atlantic Towing Corporation,* 4 Cir., 1968, 388 F. 2d 636; *Guenard v. United States,* E. D. La., 1968, 278 F. Supp. 310; *Rogers v. M/V Ralph Bollinger,* E. D. La., 1968, 279 F. Supp. 92. Nevertheless, the District Court further found that the plaintiff was not performing the type of work traditionally performed by seamen.

As to this question, the record shows that appellant was employed as a sandblaster and was performing this work when he was injured. The contract under which Bender was operating required, among other extensive repairs, that the hull and superstructure of the vessel be sandblasted in order to condition it for painting. Appellant argues that the sandblasting operation is in essence merely a current extension of the ancient and traditional work of chipping customarily performed by seamen prior to painting a vessel. It was established by appellee that the gear and equipment required for sandblasting are not carried aboard vessels at sea, that sandblasting requires certain skill, training and experience and is the work of a specialist. We agree with the District Court that the specialization required for sandblasting removes the work performed from the realm of seaman's work. *See United N. Y. & N. J. Sandy Hook Pilots Ass'n v. Halecki,* 358 U. S. 613, 79 S. Ct. 517 (1959); *McCowan v. Humble Oil and Refining Company,* 4 Cir., 1969, 405 F.2d 596. As we noted in *Atkins v. Greenville Shipbuilding Corporation,* 5 Cir., 1969, 411 F. 2d 279, 282, (*cert denied,* 396 U. S. 846, 90 S. Ct. 105 (1969)). "[T]he limiting factor of tradition ... requires that the injured shore-based worker be engaged in work traditionally that of a sea-

man . . . excluding those persons performing such tasks as making major repairs requiring drydocking or special skills." *See also Watz v. Zapata Off-Shore Co.*, etc., 5 Cir., 1970, ____ F.2d ____ [No. 27974, September 1]. In *Watz* we denied the warranty of seaworthiness to an injured shore-based shipbuilding employee, where the vessel under repair had left dry dock, was then in navigable waters, and the injury occurred aboard the vessel — the latter two factors not being present here. The status of the ship, the pattern of repairs and the extensive work involved were decisive in our holding in *Watz* that the ship was not in navigation at the time of the injury. Furthermore, looking to the "extensive nature of the work contracted to be done, rather than the specific type of work that each of the numerous shore-based workmen is doing on shipboard at the moment of injury," *West*, 361 U. S. at 122, 80 S. Ct. at 192, we reach the same conclusion here — the work was not of the type customarily performed by seamen, and there was no warranty of seaworthiness due to appellant.

AFFIRMED.

GODBOLD, Circuit Judge, concurring specially: I concur in the result reached by Judge Ainsworth. I concur in his opinion on the negligence issue. On the issue of seaworthiness, I concur in his view that no warranty of seaworthiness was owed because the vessel was not in navigation.

BROWN, Chief Judge dissenting: This is a most troublesome area. I will contribute nothing to the Court's running solution of its many variables by a

too doctrinaire approach. Recognizing, therefore, that the answer is not easy I nevertheless think this opinion, when considered along with other recent ones, see e.g., *Drake vs. Dupont de Nemours & Co., Inc.*, 5 Cir., 1970, 432 F.2d 276, 1970 A.M.C. 1915, is driving us to a position which becomes more and more inflexible and effectively waters down protection which the law gives to *Sieracki-Ryan-Yaka* vicarious seamen. It does this in two principal ways. First, it magnifies *West*[1] to the point where a ship is not a "vessel". This denies warranties of seaworthiness where the "operational withdrawal" is for but a brief period of time. Second, with a Richard Dana *Two Years Before the Mast* approach, we are measuring the activity of the worker as though the tools and facilities of the Yankee Clipper were the guide for the Twentieth Century. Today's sailor — free from any real prospect of being Shanghaied or his health destroyed from an absence of the daily ration of anti-scorbutics — is everywhere using sophisticated equipment and techniques of which radar and electronic fire-detecting devices are examples, not to mention the exacting activities of crew members of our nuclear submarine fleet or the historic atomic A/V Savannah. This expands his role beyond the simple task of one who can hand, reef and steer.[2]

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[1]West v. United States, 1959, 361 U.S. 118, 80 S. Ct. 189, 4 L.Ed.2d 161.

[2]See Norris, *The Law of Seamen*, 3d Ed., Vol. 1, § 9, pp. 25-26. "[It] was once said that a 'seaman' meant a person who could 'hand, reef and steer,' a far cry from the duties of many of today's seafarers. Unquestionably, the man in the wheelhouse of a deep-sea vessel with hand on helm keeping the ship on course is a seaman; and yet we find that the term has been applied to longshoremen; to a radio operator; to a stewardess; to a ferry hand; and even to a musician aboard a vessel."

Here the Court holds (i) M/V Flying A was withdrawn from navigation because she was in shipyard undergoing maintenance repairs for about 15 days and (ii) Johnson, in sandblasting, with a device used for decades in refurbishing the exterior of land-based buildings was not doing the work of a traditional seaman.

*The Negligence Claim*

Before analyzing these two problems I think it helpful to discard as quite irrelevant some factors which the Court keeps bringing back in. These relate to the disposition of the "negligence" claim and the fact that the injury occurred *outside* of — not *on* — the vessel arising from the use of equipment furnished, not by the vessel, but the shipyard (or its lessor). Ever since *Alaska S. S. Co. v. Petterson*, 1954, 347 U.S. 396, 74 S.Ct. 601, 98 L.Ed. 793, it has been clear that the shipowner is not insulated from responsibility because the contractor furnishes equipment of a kind which the shipowner reasonably knows will have to be used. *Italia Societa v. Oregon Stevedoring Co.*, 1964, 376 U.S. 315, 84 S.Ct. 78, 11 L.Ed.2d 732. From the standpoint of jurisdiction[3] — in the sense of the application of maritime principles — that depends not on the locale of the injury, but on the nature of the work in relation to the

[3]In addition to maritime principles there is diversity plus requisite amount in controversy here.

operation of the vessel.[4] The *Sieracki-Ryan-Yaka* seaman has a clear right to recovery for injuries sustained on the pier from cargo mishandled by the stevedoring contractor: *Burrage v. Flota Mercante Grancolombiana S.A.*, 5 Cir., 1970, 431 F.2d 1229, 1970 A.M.C. 2254; *Gutierrez v. Waterman Steamship Corp.*, 1963, 373 U.S. 206, 83 S.Ct. 1185, 10 L.Ed.2d 297, 1963 A.M.C. 1649. And in a number of instances we have held the shipowner accountable for the seaworthiness of devices located and used on the land. *Deffes v. Federal Barge Lines, Inc.*, 5 Cir., 1966, 361 F.2d 422, 1966 A.M.C. 1415; *Law v. Victory Carriers, Inc.*, 5 Cir., 1970, 432 F.2d 376, 1970 A.M.C. 2215, *cert. granted*, 1971, ___ U.S. ___, ___ S.Ct. ___, ___ L.Ed.2d ___, [___ Law Week ___, March, 1971].

If the Court is wrong on (i) withdrawal of the vessel from navigation and (ii) the lack of traditional seaman's work, the negligence claim obviously presented

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[4] O'Donnell v. Great Lakes Dredge and Dock Company, 1943, 318 U.S. 36, 42-43, 63 S. Ct. 488, ____, 87 L.Ed. 596, 602, 1943 A.M.C. 149:

> "The right of recovery in the Jones Act is given to the seaman as such, and, as in the case of maintenance and cure, the admiralty jurisdiction over the suit depends not on the place where the injury is inflicted but on the nature of the service and its relationship to the operation of the vessel plying in navigable waters."

In Braen v. Pfeifer Oil Transport Company, 1959, 361 U.S. 129, 80 S.Ct. 247, 4 L.Ed. 2d 191, 1960 A.M.C. 2, the Court on *O'Donnell, supra*, reiterated the "fact that the injury did not occur on the vessel is not controlling. * * *. A 'seaman' may often be sent off ship to perform duties of his employment * * * [but he] is as much in the service of his ship when boarding it on first reporting for duty, quitting it on being discharged, or going to and from the ship while on shore leave, as he is while on board at high sea."

a factual dispute on which the injured seaman has not yet had a trial of a kind the law assures him, either with or without a jury. Summary judgment on that score was unauthorized.

*Withdrawal of Vessel from Navigation*

Because her 13 man crew left on arrival in dry dock and did not return until some fifteen days later when repairs were completed, the Court holds M/V Flying A was withdrawn from navigation in the *West-Roper* sense. Just what the presence or absence of the crew has to do with the problem has never been clear and even my own limiting concurrence in *Moye*[5] is less and less satisfactory. A longshoreman injured in the hold from a defective fall or line (furnished by the employer stevedoring contractor) has a plain right of recovery on unseaworthiness. The presence or absence of the crew of 50 sailors is completely irrelevant.[6] Of course it would be relevant in those instances in which it is the crew, not the contractor's employee, which brought into play the unseaworthy conditions. A ship is hardly withdrawn from her employment as a vessel when she goes into a shipyard for required periodic survey and maintenance repairs — no more so than she would be when, as a cargo vessel, she puts into port for a 10 day discharging and loading of cargo

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[5]Moye v. Sioux City & New Orleans, Inc., 5 Cir., 1968, 402 F.2d 238, *Cert. denied*, 1968, 395 U.S. 913, 89 S.Ct. 1759, 23 L.Ed. 226.

[6]For example, had Johnson been chipping paint on the scaffold while the full crew was aboard M/V Flying A seaworthy warranties would be present even though the presence of the crew contributed nothing toward the accident or its causes.

with all or part of the crew allowed extended shore leave.

Of course duration of the "lay-up" is important, and even more so, is the activity (or lack of it) in an operational sense. To put a ship into a mothball fleet, and then to break her out one or two years later with the certain knowledge that re-outfitting is essential, is one thing. Likewise is the use of the vessel as a floating granary. But when the vessel is actively engaged in commercial trade — as M/V Flying A was for the year preceding drydocking — and she returns directly to that activity as an ocean-going bulk petroleum carrying vessel immediately after completion of the shipyard work, it is artificial to think that for that brief period she was withdrawn from navigation, and, for purposes of the law, that she ceased to be a ship. And, at a minimum, that conclusion could only be reached by a fact-finder from conflicting inferences, not as a matter of law by summary judgment.

From a reading of this Court's opinion one would think that the vessel was being wholly rebuilt. Cf. *Watz v. Zapata Off-Shore Company*, 5 Cir., 1970, 431 F.2d 100, 1970 A.M.C. 2307. Just how judges — "Solomonic or life tenured"[7] — can reach this conclusion as a *matter of law*, I do not know. If we know anything we know that in this inflated world in which a slight traffic tap precipitates an automobile repair bill running into

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[7]Phillips v. Martin Marietta Corporation, 5 Cir., 1969, 416 F.2d 1257, 1259 (dissent); rev'd ____ U.S. ____, ____ S.Ct. ____, ____ L.Ed.2d ____ [39 Law Week 4160, January 25, 1971].

the hundreds of dollars for bumper and fender damage, $30,000 will not buy much in the way of steel and skilled labor.

But we need not search out the limits of our prescience for this record shows not extensive re-outfitting, but routine, periodic maintenance repairs. Out of the 42 items on the ship repair invoice, 34 were for items not in excess of $500. Indeed, of the 34, over 16 were for less than $200 each. They covered such routine items as removal of a wasted sun visor over the pilot house window, building up a docking plug in a cargo tank, mucking out (cleaning) the anchor chain locker of mud and debris, a micrometer reading of the two tail shafts, renewal of a six-foot length of a one-inch pipe guardrail, replacing five deck vent ports, repairing five treads in two ladders (stairs), installing five steam hose hangars, and the like. The most extensive items were sandblasting and repainting the hull ($10,000) and the necessary lay days ($1,100). None of the other items was of a radical, unusual or extensive nature. These include renewal of a 10-inch deck cargo header line on the main deck ($2,625), repairs to the starboard generator ($1,562), and pulling and reinstalling tail shafts and propellers ($2,952). Although these were important repairs which a prudent shipowner would undertake,[8] there is not a stitch of evidence in the affidavits or depositions to indicate that they were anything but routine periodic survey and maintenance repairs.

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[8] A number of the items were marked "ABS". This refers to the American Bureau of Shipping which, in the enforcement of federal ship safety standards, has a quasi-governmental status along with the Coast Guard.

But considering the size of the vessel — 260 feet in length — and her obvious value,[9] neither the dollar amount of these repairs nor their nature indicated anything so drastic as to characterize the vessel as "withdrawn" from navigation.

In *Grigsby*[10] we rejected the literalism of *West* that a vessel would be taken out of navigation merely because the ship was not in the immediate control of her crew. From the instant case and other recent ones I fear that although we verbally give heed to our restricted reading of *West*, we take 10 to 15 days plus absence of the crew to add up in a mechanical way to the withdrawal from navigation. To be sure the Court says a case must be judged on its own facts. But what is the standard? — the irrelevancy of no crew member aboard? — the given fact of a number of days that it was inoperative? — the nature of repairs in terms of operational navigability? Or what?

Finally on this point the most that can be made out is that whether nature, kind, and cost (in dollars, time or both) of the shipyard work was so great as to characterize the temporary layup of the vessel as a withdrawal from navigation was a question of fact for a trial, not one for summary judgment on this record.

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[9] At least if $30,000 was disproportionate to her value it ought to have been proved as a fact, which was not done here.

[10] Grigsby v. Coastal Marine Service of Texas, Inc., 5 Cir., 1969, 412 F.2d 1011, 1969 A.M.C. 1513, *cert. dism'd*, 396 U.S. 1033, 90 S.Ct. 612, 24 L.Ed.2d 531; this was upheld on "instant unseaworthiness", 412 F.2d 1011 at 1030, in *Usner v. Lukenbach*, 1971, ____ U.S. ____, ____ S.Ct. ____ ____ L.Ed.2d ____, [No. 47, January 25, 1971].

*Lack of Traditional Seaman Work*

Little need be said about the second phase — traditional work of a seaman. The fact is that in *Jackson*[11]

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[11]Jackson v. Lykes Bros. Steamship Co., Inc., 1967, 386 U.S. 731, 87 S.Ct. 1419, 18 L.Ed.2d 488. At note 4 of this opinion the Court pointed out:

"In 1953 this Court held in Pope & Talbot, Inc. v. Hawn, 346 US 406, 98 L ed 143, 74 S Ct 202, that other kinds of maritime employees, besides stevedores, who performed jobs formerly done by seamen were entitled to the seaworthiness protection given in Sieracki. There we said:

It is pointed out that Sieracki was a 'stevedore.' Hawn was not. And Hawn was not loading the vessel. On these grounds we are asked to deny Hawn the protection we held the law gave Sieracki. These slight differences in fact cannot fairly justify the distinction urged as between the two cases. Sieracki's legal protection was not based on the name 'stevedore' but on the type of work he did and its relationship to the ship and to the historic doctrine of seaworthiness. The ship on which Hawn was hurt was being loaded when the grain loading equipment developed a slight defect. Hawn was put to work on it so that the loading could go on at once. There he was hurt. His need for protection from unseaworthiness was neither more or less than that of the stevedores then working with him on the ship of seamen who had been or were about to go on a voyage. All were subjected to the same danger. All were entitled to like treatment under law." 346 US at 412-413, 98 L ed at 152, 153.

Subsequent decisions in line with the general concepts put forth by this Court has read Sieracki expansively, and a wide range of maritime employees have been granted the benefits of the seaworthiness doctrine. Carpenters (Pope & Talbot, Inc. v Hawn, 346 US 406, 98 L ed 143, 74 S Ct 202); electricians (Feinman v A. H. Bull S. S. Co. 216 F2d 393); shipcleaners (Torres v The Kastor, 227 F2d 664, and Crawford v Pope & Talbot, Inc., 206 F2d 784); repairmen (Read v United States, 201 F2d 758); and riggers (Amerocean S. S. Co. v Copp, 245 F2d 291), who per-

the Supreme Court has itself abandoned the rigid standards of *Halecki*.[12]

When the tool used (sandblaster) was no more novel than that employed for decades in building refurbishment, it does not change the nature of the work that is being done — chipping off the paint and rust — from that done by sailors for centuries. To paint the cleaned surface with a compressor-powered air brush would hardly change the work from painting with a brush out of a paint pot even though in the glorious days of the Clippers, Richard Dana and his foc's'le mates would have searched long in the bos'ns' locker for such a device.

M/V Flying A was very much in service — indeed the overhaul was to *keep* her in service, not to restore her to a service long abandoned. And with sandblaster in hand Johnson was doing that done for decades by those who go down to seas in ships. Or at least a jury should be the one to say.

I therefore respectfully dissent.

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formed jobs formerly done by seamen, have recovered from shipowners on the seaworthiness doctrine. See Note, 75 Yale LJ 1174, 1183."

[12]United New York and New Jersey Sandy Hook Pilots Association v. Halecki, 1959, 358 U.S. 613, 79 S.Ct. 517, 3 L.Ed.2d 541.

## APPENDIX B

IN THE
UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

JAMES JOHNSON,
Plaintiff-Appellant,

versus

OIL TRANSPORT COMPANY, INC., a Corporation, Inc.,
Defendant and Third Party
Plaintiff-Appellee;

versus

Civil Action
No. 28418

BENDER WELDING & MACHINE COMPANY, INC.,
Third-Party Defendant.

This matter comes before the Court on the motion of the defendant, Oil Transport Company, Inc., for summary judgment in accordance with Rule 56 of the Federal Rules of Civil Procedure. The motion was filed on May 29, 1969, and was submitted to the Court after oral argument by counsel of record on July 2, 1969.

The material facts in this action are not in dispute and the cause is properly before the Court for a summary judgment determination.

Now after consideration thereof, the Court enters the following findings.

The defendant, Oil Transport Company, is the owner and operator of the M/V FLYING A. Sometime prior to June 8, 1966, the defendant and the third-party defendant, Bender Welding and Machine Company, Inc., entered into an agreement whereas the third-party defendant was to perform a general overhaul of the M/V FLYING A beginning on or about the 9th day of June 1966, and to be completed approximately ten days later. The work was in fact completed on June 18, 1966. The vessel arrived in Mobile on June 8, 1966, and went into drydock on June 9, 1966, in Bender's yard. The repair work was commenced immediately.

On June 12, 1966, the plaintiff herein, was employed by Bender as a sandblaster and was sandblasting the outside of the vessel's hull. The plaintiff was standing on scaffolding which had been constructed on the outside of the vessel when he fell and was injured.

The plaintiff filed suit against the defendant alleging the vessel to be unseaworthy and negligence on the part of the defendant for failing to provide the plaintiff with a reasonable safe place to work. The defendant filed a third-party complaint against Bender alleging indemnification if the defendant is found liable to the plaintiff.

In support of the motion for summary judgment the defendant asserts: (1) That the vessel was not engaged in navigation at the time of the accident, and (2) the

plaintiff was not performing work traditionally done by seaman and hence is not entitled to the warranty of seaworthiness. A finding that the vessel was in navigation and that the plaintiff was performing work of seaman is essential to the plaintiff's recovery for unseaworthiness. After careful consideration of facts, the Court concludes that the plaintiff fails on both points.

At the time of the accident, the M/V FLYING A was out of the water on drydock; no crew or personnel was aboard, no meals prepared and no watches kept; the vessel had no power of its own and was supplied with shorebased power; the vessel had no propeller; the repairs were extensive, approaching $30,000.00 in cost; the repairs were performed under the exclusive control and supervision of Bender's personnel; and the vessel had been totally surrendered to the care and custody of the shipyard. Under these facts, the Court cannot hold as a matter of law that the M/V FLYING A was in navigation. This conclusion alone defeats plaintiff's recovery under the doctrine of unseaworthiness, but in the event the vessel was held to be in navigation, the Court further finds that the plaintiff was not performing the type of work traditionally performed by seaman. The craft of sandblasting was unknown by "traditional seaman", but an able argument may be presented that sandblasting is only a modern extension of painting and chipping which unquestionably was a traditional task of seaman. However, sandblasting is somewhat of a specialized field and cannot be performed by an ordinary laborer. Experience and mechanized equipment are required and such specialization removes the craft from the realm of seaman's

work. *McCowan v. Humble Oil and Refining Company*, 405 F.2d 596, (4th C.A. 1969). The plaintiff is not entitled to warranty of seaworthiness.

The shipowner who surrenders his vessel to the shipyard is under a duty to furnish a reasonably safe place to work to shorebased workers who, by the nature of their work, are expected to be aboard the vessel. *White v. United States*, 400 F.2d 74 (4th C.A. 1968). The above legal principle is the basis for plaintiff's assertion of negligence on the part of the defendant.

It is affirmatively established by the plaintiff's deposition which is on file in this cause that he never went aboard the vessel, that he never touched the vessel. His work was to be performed completely on the outside of the vessel with equipment which was owned and managed by his employer and which was shorebased. The plaintiff worked completely under the direction and supervision of Bender's personnel. None of the equipment or scaffolding was supplied, operated or owned by the defendant. The vessel and the overhaul operation was in the complete care and custody of the shipyard. The contention that the defendant was negligent is not supported by the undisputed facts.

Therefore, it is ORDERED, ADJUDGED and DECREED by the Court that the motion for summary judgment filed by the defendant, Oil Transport Company, Inc., should be and is hereby GRANTED as it affirmatively appears that the defendant is entitled a judgment as a matter of law.

DONE at Mobile, Alabama, this the 15th day of July 1969.

DANIEL H. THOMAS
UNITED STATES DISTRICT
JUDGE

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**APPENDIX C**

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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October Term, 1970

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No. 28418

D. C. Docket No. CA 5160-68-T
JAMES JOHNSON,
Plaintiff-Appellant,
versus

OIL TRANSPORT COMPANY, INC., a corporation,
Defendant and Third-Party
Plaintiff-Appellee,
versus

BENDER WELDING & MACHINE COMPANY, INC.,
Third-Party Defendant.

Appeal from the United States District Court for the Southern District of Alabama

---

Before BROWN, Chief Judge, AINSWORTH and GODBOLD, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Alabama, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered that plaintiff-appellant pay to defendant and third-party plaintiff-appellee and third-party defendant, the costs on appeal to be taxed by the Clerk of this Court.

March 12, 1971

GODBOLD, Circuit Judge, concurring specially:
BROWN, Chief Judge dissenting:
Issued As Mandate:

## APPENDIX D

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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No. 28418

---

JAMES JOHNSON,
Plaintiff-Appellant,

versus

OIL TRANSPORT COMPANY, INC., a corporation,
Defendant and Third-Party
Plaintiff-Appellee,

versus

BENDER WELDING & MACHINE COMPANY, INC.,
Third-Party Defendant.

---

Appeal from the United States District Court for the Southern District of Alabama

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*ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC*

(Opinion March 12, 1971, 5 Cir., 1971, ____ F.2d ____).

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(June 24, 1971)

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Before BROWN, Chief Judge, AINSWORTH and GODBOLD, Circuit Judges.

PER CURIAM: The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the Petition for Rehearing En Banc is also DENIED.

BROWN, Chief Judge, DISSENTING:

For the reasons stated in my dissent to the panel's decision, I dissent to the Court's denial of rehearing en banc. This encompasses both (i) the substantive error and (ii) the importance of the problem.

On the importance phase, each day offers fresh proof. In a fascinating — and in my judgment an otherwise correct — decision, Judge Dyer's opinion for this Court in finding no admiralty jurisdiction does it solely on the basis that the nature of the work being done disqualified the repairyard employee as a *Sieracki* vicarious seaman. *Delome v. Union Barge Line Co., et al.*, 5 Cir., 1971, ____ F. 2d ____ [No. 31037, June 8, 1971]. On this test I can imagine few repair jobs on modern ships which would qualify. Nearly all will require heavy steel plates, cranes or hoists, welding equipment and, for that matter, the use of floating dry docks and the like.

Almost as recent is the opinion of Judge Clark for us in *Keller v. Dravo Corp.*, 5 Cir., 1971, ___ F.2d ___ [No. 30255, April 28, 1971]. There decision turns on the withdrawal of the vessel from navigation in the *West* sense because the recent sinking of the barge made extensive repairs essential. A common hazard in the shipping trade is that of collision with the prospect that bows will be holed calling for drydocking and expensive repairs which are designed to restore to active trading a vessel which has been withdrawn from so-called "navigation" only briefly and then frequently by reason of conditions beyond her control.

True, the *Sieracki-Ryan-Yaka* syndrome is the subject of much criticism. But until it is repudiated it ought not to be stranded on such restrictive limitations.

Except for the traditional longshoreman loading or discharging cargo and repairmen making repairs or adjustments calling only for simple hand tools the warranty of seaworthiness means little in the Fifth Circuit. And what little it means today dwindles tomorrow with each new opinion.

Whether my substantive view is correct is not too important. But I think it important that the whole Court should pass on these principles of recurring significance. Failing to do that, I can only hope others will do so.

## APPENDIX E

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

Office of the Clerk
Edward W. Wadsworth
Clerk
Room 408 — 400 Royal St.
New Orleans, La. 70130

July 8, 1971

Messrs. Francis M. Thigpen
Ross Diamond, Jr.
Attorneys at Law
610 Van Antwerp Bldg.
Mobile, Alabama 36601

No. 28418 — James Johnson vs.
Oil Transport Co., Inc. vs.
Bender Welding & Machine
Co., Inc.

MANDATE STAYED TO: August 7, 1971

Dear Sir:

The court has this day granted a stay of the issuance of the mandate to the date as shown above. If during the period of the stay there is filed with the clerk of this court a notice from the clerk of the Supreme Court that the party who has obtained the stay has filed a petition for the writ in that court, the stay shall continue until final disposition by the Supreme Court. Up-

on the filing of a copy of an order of the Supreme Court denying the petition for writ of certiorari the mandate shall issue immediately under Rule 41, FRAP.

Under revised Rule 21(1) of the Supreme Court effective July 1, 1970, a record is no longer required in connection with an application for writ of certiorari, and therefore will not be routinely prepared by this office (38 LW 3502).

Enclosed is a copy of the opinion, judgment and order denying rehearing which are still required by the Supreme Court to be incorporated as an appendix to your petition.

Very truly yours,

EDWARD W. WADSWORTH,
Clerk
(Signed) CLAUDETTE STAIGER
Deputy Clerk

enc.
cc: Mr. Brunswick G. Deutsch

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Supreme Court, U.S.
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SEP 3 1971
E. ROBERT SEAVER, CLERK

# Supreme Court of the United States

**OCTOBER TERM, 1971**

## No. 71-192

**JAMES JOHNSON,**

**Petitioner,**

**versus**

**OIL TRANSPORT COMPANY, INC.,**
**THE FLYING A, AND**
**BENDER WELDING & MACHINE COMPANY, INC.,**

**Respondents.**

## BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

**BRUNSWICK G. DEUTSCH**
**1700 Hibernia Bank Bldg.,**
**New Orleans, La. 70112**
**Attorney for Respondent**
**Oil Transport Company, Inc.**

**DEUTSCH, KERRIGAN & STILES**
**and**
**EDWIN J. CURRAN, JR.,**
**VICKERS, RIIS, MURRAY AND CURRAN**
**OF COUNSEL**

SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1971

---

No. 71-192

---

JAMES JOHNSON,

Petitioner,

versus

OIL TRANSPORT COMPANY, INC.,
THE FLYING A, AND
BENDER WELDING & MACHINE COMPANY, INC.,

Respondents.

---

# BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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Petitioner bases his application for *certiorari* on a statement of fact wholly unsupported by the record.

The facts as stated by the Court of Appeals are:

> "On June 8, 1966, the vessel was placed in dry dock. Work was begun on the following day and completed nine days thereafter on June 18, at a total cost of $29,160. The accident occurred in the interim, on June 12. During the time the vessel was in dry dock, electrical power and water for fire protection were shorebased and furnished by Bender. No meals were prepared

and no watches were kept on board ... One propeller of the twin-screw vessel had been removed ... [N]o officer or crewman either went aboard the vessel or was present at the shipyard with the exception of the chief engineer, who was quartered ashore in the City of Mobile and who visited the yard periodically to inspect the work." 440 F2d 109, 113 (CA 5-1971).

* * * *

"In the present case there was much more than mere relinquishment of possession and control of the vessel. No part of the ship or its machinery was in anywise defective, the vessel did not cause equipment to become defective, and the injury was not sustained aboard the vessel. The worker, who never went aboard the ship at any time, fell from a scaffold which was rented and erected by the ship repairer. The scaffold did not touch the vessel, and the work was under the exclusive charge of the ship repairer. The injury occurred off the vessel when Johnson fell from the scaffolding to the floor of the dry dock." 440 F2d at 115-116.

In *Moye vs Sioux City & New Orleans Barge Lines, Inc.*, 402 F2d 238 (CA 5-1968), cert. den., 395 US 913, in which Chief Judge Brown concurred, the Court of Appeals for the Fifth Circuit held:

"Upon the complete surrender of control of the barge by Sioux City to Saucer for repairs, there was no duty owed by Sioux City to protect Moye from risks inherent in carrying out the contract . . ." 402 F2d at 241.

It is respectfully submitted that the application for *certiorari* should be denied.

Respectfully submitted,

BRUNSWICK G. DEUTSCH
of
Deutsch, Kerrigan & Stiles
1700 Hibernia Bank Bldg.
New Orleans, La. 70112
Attorney for Respondent
Oil Transport Company, Inc.

New Orleans
September 3, 1971

## PROOF OF SERVICE

I, Brunswick G. Deutsch, one of the attorneys for Respondent herein and a member of the Bar of the Supreme Court of the United States hereby certify that on the 3rd day of September, 1971, I served three copies of the foregoing brief in opposition of Respondent on James Johnson by mailing the same in duly addressed envelopes, with first-class postage prepaid, to Ross Diamond, Jr., Esq., 610 Van Antwerp Bldg., Mobile, Alabama, 36601, counsel for Petitioner, James Johnson; and to A. Clay Rankin, III, Esq., 3000 First National Bank Bldg., Mobile, Alabama, 36602, counsel for Respondent, Bender Welding & Machine Company, Inc.

Brunswick G. Deutsch

SUPREME COURT, U.S.
FILED
SEP 4 1971
ROBERT SEAVER, CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-192

JAMES JOHNSON,

Petitioner,

versus

OIL TRANSPORT COMPANY, INC.,
THE M/V FLYING A, AND BENDER
WELDING AND MACHINE COMPANY, INC.,

Respondents.

## BRIEF OF RESPONDENT BENDER WELDING & MACHINE COMPANY, INC., IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

ALEX F. LANKFORD, III
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and Machine Company, Inc.

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1971

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NO.

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JAMES JOHNSON,

Petitioner,

versus

OIL TRANSPORT COMPANY, INC., THE M/V FLYING & BENDER WELDING AND MACHINE COMPANY, INC.

Respondents.

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# BRIEF OF RESPONDENT BENDER WELDING & MACHINE COMPANY, INC., IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED FOR REVIEW

Johnson's Petition for a Writ of Certiorari presents two basic issues to this Court:

1. Does the shipowner owe a warranty of seaworthiness to a shore-based repair contractor's employee who is injured after control of the vessel is transferred to the contractor, and as a result of conditions created by the contractor?

2. Is a shore-side repair worker who is a specialist, and and whose work requires the use of sophisticated and special equipment not normally found aboard vessels at sea, doing "seamen's work," so as to be the beneficiary of an implied warranty of seaworthiness?

## STATEMENT OF THE CASE

On June 9, 1966, the M/V FLYING A was delivered by her owner Oil Transport Company, Inc. ("Oil Transport"), to Bender Welding & Machine Company, Inc. ("Bender"), a ship repair contractor in Mobile, Alabama, for drydock and repair. Normal shipboard activities ceased upon transfer of control to Bender, and most of the officers and crew went on leave. None of the vessel personnel were quartered aboard her, no meals were prepared, and no watches kept. The only ship's officer who remained in the vicinity was the chief engineer, who stayed in Mobile to inspect and to pass upon the repairs as they were completed. Bender had absolute control over the manner and order in which the work was done, and sole supervision of the repair personnel.

The plaintiff James Johnson, an employee of Bender, was a skilled sand blasting specialist. His duties required the use of special shore-based equipment of a type which is never carried aboard vessels at sea. Mr. Johnson was injured when he fell off a scaffolding which had been erected around the vessel as she lay on drydock. Bender supplied and erected the scaffolding, and supervised the activities of the workmen operating on and around it.

In short, the record unequivocally shows that control over the vessel, and over the instrumentalities allegedly giving rise to the injury, had been transferred by the shipowner to the repair contractor, and that Mr. Johnson was not doing work traditionally performed by seamen.

Bender therefore respectfully submits that the Trial Court and the Court of Appeals for the Fifth Circuit were correct in deciding that the shipowner was entitled to summary judgement on the issue of unseaworthiness.

## ARGUMENT

1. *The law as to the effect of transfer of control on the existence of the warranty of seaworthiness has been well established by this Court, and has been consistently followed by the Circuit Courts of Appeals.*

In *West vs. United States,* 361 U. S. 118 (1959), this Court held that where a ship needs repairs which require transfer of control from the shipowner to a shore-based contractor, there can be no implied warranty of seaworthiness to any person injured while the vessel remains in the control of the contractor. This rule is conceptionally sound and has been found to be workable in practice. Indeed, there is no conflict among the Circuits as to its application. See, e.g., *Moye vs. Sioux City & New Orleans Barge Lines, Inc.*, 402 F.2d 238 (5th Cir. 1968), *cert. den.*, 395 U. S. 913 (1969), *rehearing den.*, 395 U. S. 987 (1969); *Van Horne vs. Gulf Atlantic Towing Corporation,* 388 F.2d 636 (4th Cir. 1968); *Lawlor vs. Socony Vacuum Oil Company,* 275 F.2d 599 (2nd Cir. 1960), *cert. den.*, 363 U. S. 844 (1960).

The Court of Appeals for the Fifth Circuit in this case recognized and was guided by the settled authorities on the importance of control. *Johnson vs. Oil Transport Company, 440* F.2d 109, 111-116 (5th Cir. 1971). All parties recognized the significance of this issue, but petitioner did not and could not offer any evidence supporting his side of the contest. The District Court and the Fifth Circuit correctly decided that the record presented no genuine issue of fact on this point.

2. *The law is well settled that where the repair operation as a whole requires specialized skill and equipment the workers engaged therein do not perform work traditionally done by seamen, and are therefore not owed a warranty of seaworthiness.*

Since this Court decided the case of *United New York & New Jersey Sandy Hook Pilots Association vs. Halecki*, 358 U. S. 613 (1959), there has been no question but that one who is a "specialist," and whose work requires "special skill and special equipment" is not owed a warranty of seaworthiness. *West vs. United States, supra,* modified the classic "ship's service test" of *Halecki,* and instead focused attention upon the "status of the ship, the pattern of repairs, and the extensive nature of work contracted to be done, rather than the specific type of work that each of the numerous shore-based workmen is doing on shipboard at the moment of injury." [361 U. S. at 122.] Thus, rather than examining exactly the work being done by each individual workman at the time of his injury, the inquiry encompasses the entire repair operation, and seeks to determine whether the entire "pattern of repairs" is within the ambit of traditional seamen's work.

The Circuit Courts of Appeals have accurately applied these criteria since *Halecki* and *West.* See, e.g., *Atkins vs. Greenville Shipbuilding Corporation,* 411 F.2d 279 (5th Cir. 1969); *McCown vs. Humble Oil & Refining Company,* 405 F.2d 596 (4th Cir. 1969). The Fifth Circuit followed the settled law in the instant case. (440 F.2d 116-117.) The very fact that the repairs were extensive enough to require transfer of control to a shore-side contractor, with sophisticated equipment not found on vessels at sea, and with skilled laborers such as the petitioner, shows without question that the result reached by the lower court was correct.

## CONCLUSION

We therefore respectfully submit that this Court has established clear and workable guidelines for determining the existence of the warranty of seaworthiness as it applies to shore-based repair workers, and that the Circuit Courts of Appeals have followed these guidelines; that there is no need to reconsider these standards; and that Johnson's Petition for Writ of Certiorari should therefore be denied.

Alex F. Lankford, III

ALEX F. LANKFORD, III

## CERTIFICATE OF SERVICE

I, Alex F. Lankford, III, one of the attorneys for respondent Bender Welding & Machine Company, Inc., and a member of the Bar of the Supreme Court of the United States, hereby certifies that on the 3rd day of September, 1971, I served three (3) copies of the foregoing brief on James Johnson, and on Oil Transport Company, Inc., by mailing same in duly addressed envelopes with first class postage prepaid to the Honorable Ross Diamond, Jr., Post Office Box 432, Mobile, Alabama 36601, and to the Honorable Brunswick Deutsch, 1700 Hibernia Bank Building, New Orleans, Louisiana 70112.

Alex F. Lankford, III

ALEX F. LANKFORD, III

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1971

# No. 71-192

JAMES JOHNSON,

Petitioner,

versus

OIL TRANSPORT COMPANY, INC.,
THE M/V FLYING A, AND BENDER
WELDING AND MACHINE COMPANY, INC.,

Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

## PETITION FOR REHEARING

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# PETITION FOR REHEARING

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The Petitioner herein respectfully moves this Court for an order (1) vacating its denial of the Petition for Writ of Certiorari, entered on October 12, 1971, and (2) granting the Petition. As grounds for this Motion, Petitioner states the following:

1. The Petition for a Writ of Certiorari in *C. J. Delome v. Union Barge Line, Company v. Platzer Shipyard, Inc.*, October Term 1971, No. 71-454.

There is presently pending before the Court, *Delome v. Union Barge*, No. 71-454. In *Delome*, the Fifth Circuit Court of Appeals considered facts similar to those of the instant case and reached the same erroneous conclusions of law. A Petition for Certiorari has been applied for in that case which is presently pending before this Court. The American Trial Lawyers Association has filed a brief Amicus Curiae in support of *Delome's* Petition which is also pending.

In *Delome* the Petitioner was engaged in replacing metal frames in the forward rake of a barge in navigation. It was found that he was not performing the traditional work of a seaman and was therefore owed no warranty of seaworthiness.

In the instant case, James Johnson was using a sandblaster to remove old paint (scale) and rust from the hull of a vessel in preparation for painting. It was held by the Fifth Circuit Court of Appeals that Johnson was not performing the traditional work of seamen.

Petitioner suggests that should this Court grant the Petition for a Writ of Certiorari in the *Delome* case, and find that *Delome* is entitled to the protection of the warranty of seaworthiness, then a clarification of the instant case will be necessary.

Petitioner herein respectfully shows that Counsel for the Petitioner *James Johnson* and Counsel for Petitioner *C. J. Paul Delome* have no objection to both cases being consolidated for argument.

It is therefore respectfully requested that this Court reconsider its order denying the Petition for Writ of

Certiorari in light of the Petition pending in *Delome v. Union Barge Line*, No. 71-454.

Respectfully submitted,

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**PROOF OF SERVICE**

I, Ross M. Diamond, Jr., one of the attorneys for Petitioner herein and a member of the Bar of the Supreme Court of the United States hereby certify that on the ____day of November, 1971, I served three copies of the foregoing brief of Petitioner on Oil Transport Company Inc., and Bender Welding and Machine Company Inc., by mailing to same in duly addressed envelopes with first class postage prepaid to Hon. Brunswick Deutsch, 1700 Hibernia Bank Building, New Orleans, Louisiana 70112 and to Hon. A. Clay Rankin, 30th Floor First National Bank Building, Mobile, Alabama 36601, Attorneys for Respondents.

ROSS M. DIAMOND, JR.